

No. 12927

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ANN SHERIDAN,

*Plaintiff, Appellee and Cross-Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a Delaware corporation,

*Defendant, Appellant and Cross-Appellee.*

---

## BRIEF OF APPELLEE ANN SHERIDAN.

---

GANG, KOPP & TYRE,

MARTIN GANG and

MILTON A. RUDIN,

1680 North Vine Street,

Los Angeles 28, California,

*Attorneys for Appellee, Ann Sheridan.*



## TOPICAL INDEX.

	PAGE
Preliminary statement .....	1
Statement of the case.....	3
A. Statement of the facts.....	3
B. Analysis of RKO's specifications of error.....	8
C. Statement of questions presented by RKO's appeal.....	10
Argument .....	11
I.	
On April 29, 1949, Sheridan obligated herself to render services pursuant to the contract commencing July 6, 1949.....	11
II.	
The jury was properly instructed as to the implied covenant of good faith .....	14
III.	
The District Court properly submitted to the jury the issue of whether Sheridan rendered services pursuant to the contract; the District Court did submit to the jury the issue of whether the parties exercised good faith in attempting to reach an agreement on a substitute for Robert Young .....	16
IV.	
The charge of the District Court was not erroneous in the particulars which RKO assigns as error.....	18
Court's Instruction A.....	18
Court's Instruction B.....	19
Court's Instruction G.....	19
Court's Instruction H-1.....	20
Court's Instruction J-1.....	25
Court's Instructions L, P and Q .....	25
RKO's Requested Instructions Nos. 1, 2, 5, 6, 7, and 8.....	26
Conclusion .....	28

# TABLE OF AUTHORITIES CITED.

CASES	PAGE
Cantwell v. Gage, 111 Cal. App. 209, 295 Pac. 375.....	11
Clark v. Volpa Bros., 51 Cal. App. 2d 173, 124 P. 2d 377.....	23
Dawson v. Boyd, 61 Cal. App. 2d 471, 143 P. 2d 373.....	27
Hart v. Farris, 218 Cal. 69, 21 P. 2d 432.....	26
Johnson v. Southern Pacific, 105 Cal. App. 340, 288 Pac. 81.....	26
Kahn v. Triest-Rosenberg Cap. Co., 139 Cal. 340, 73 Pac. 164..	27
Keller v. Pac. Tel. & Tel. Co., 2 Cal. App. 2d 513, 38 P. 2d 182 .....	20
La Rue v. Powell, 5 Cal. App. 2d 439, 42 P. 2d 1063.....	20
Lynch v. Keystone Consol. Mng. Co., 163 Cal. 690, 126 Pac. 968 .....	11
Mazzotta v. L. A. Ry. Corp., 25 Cal. 2d 165, 153 P. 2d 338....	20
Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033.....	27
Mullanix v. Basich, 67 Cal. App. 2d 675, 155 P. 2d 130.....	27
Nelson v. Isaac Abrahams, 29 Cal. 2d 745, 177 P. 2d 931.....	14
Nelson v. Southern Pacific, 8 Cal. 2d 648, 67 P. 2d 682.....	26
Nelson, Estate of, 191 Cal. 280, 216 Pac. 368.....	27
Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 .....	21
Ryan v. L. A. I. & C. S. Co., 112 Cal. 244, 44 Pac. 471.....	23
Sinan v. A. T. & S. F. Ry. Co., 103 Cal. App. 703, 284 Pac. 1041 .....	21
Starr v. L. A. Ry. Co., 187 Cal. 270, 201 Pac. 599.....	21
Stein v. Lacassie, 189 Cal. 118, 207 Pac. 886.....	24
Taha v. Finegold, 81 Cal. App. 2d 536, 184 P. 2d 533.....	22
Universal Sales Corp. v. Calif. Press Mfg. Co., 20 Cal. 2d 751, 128 P. 2d 665.....	14

	PAGE
Van Orden v. Metson, 75 Cal. App. 2d 595, 171 P. 2d 485.....	11
Vinther v. Sunset Mutual, etc., Co., 11 Cal. App. 2d 118, 53 P. 2d 182.....	23
Walker, Estate of, 180 Cal. 478, 181 Pac. 792.....	27

#### TEXTBOOKS

24 California Jurisprudence, Sec. 77, pp. 803, 804.....	26
24 California Jurisprudence, Sec. 79, pp. 806-810.....	27
24 California Jurisprudence, Sec. 101, p. 841.....	23



No. 12927  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ANN SHERIDAN,  
*Plaintiff, Appellee and Cross-Appellant,*  
*vs.*

RKO RADIO PICTURES, INC., a Delaware corporation,  
*Defendant, Appellant and Cross-Appellee.*

---

**BRIEF OF APPELLEE ANN SHERIDAN.**

---

**Preliminary Statement.**

This brief is in reply to the points relied upon in RKO's Opening Brief.<sup>1</sup>

RKO sets forth 14 specifications of error based upon the instructions given by the District Court to the Jury and the District Court's refusal to give certain jury instructions requested by RKO.

RKO contends that the District Court's Instructions A, B, G, H-1, J-1, L, P and Q were erroneous and that

---

<sup>1</sup>Since both parties have appealed, for convenience Ann Sheridan (plaintiff below) is herein referred to as "Sheridan" and RKO Radio Pictures, Inc. (defendant below) is herein referred to as "RKO."

the District Court erred in refusing to give RKO's Requested Instructions 1, 2, 5, 6, 7 and 8. In the final analysis all of the specifications of error rest upon the contention by RKO that the District Court erroneously held that Sheridan was obligated to render her services pursuant to the contract after she approved (a) the script of the screenplay, (b) John Cromwell, Robert Stevenson or H. C. Potter to act as director and (c) Robert Young as the actor to portray the leading male role in "Carriage Entrance."

If said contention of RKO is not well taken, then all of the 14 specifications of error relied upon by RKO are not well taken.

In support of the contention that Sheridan was never obligated to render services, RKO argues that although Sheridan approved Robert Young as the actor to portray the leading male role, she did not approve the actor to portray the leading male role because the letter of approval (prepared by RKO) left RKO an "out" by providing that RKO was not obligated to assign the role to Robert Young. The fallacy of RKO's argument is that it rests upon the proposition that an "approval" is not an "approval."

## Statement of the Case.

### A. Statement of the Facts.

Cross-Appellant Sheridan's Opening Brief contains a statement of the facts relating to the points relied upon by Sheridan in connection with her appeal. (Sheridan's Op. Br. pp. 2-4.) We herein set forth certain additional facts relating to RKO's appeal.

Pursuant to the contract between the parties [Pltf. Ex. 1], Sheridan obligated herself to render her services for RKO in the production of the motion picture "Carriage Entrance"; including the obligation "to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with Carriage Entrance . . ." [Pltf. Ex. 1; pars 1 and 12; Sheridan's Op. Br. App. pp. 1-2, 7.]

Paragraph 1 of the contract provided that Sheridan "would not be required to render any services pursuant hereto unless and until she has approved each and all of the following:

"(a) The final shooting script of the screenplay for Carriage Entrance;

"(b) The director who will direct Carriage Entrance; and

"(c) The actor who will portray the leading male role in Carriage Entrance." (Sheridan's Op. Br. App. p. 1.)

Paragraph 1 of the contract provided that Sheridan had already approved the script of "Carriage Entrance." (Sheridan's Op. Br. App. pp. 1-2.)

In order to make sure that Sheridan would be obligated and bound to render her services pursuant to the contract, RKO had Sheridan execute and deliver a letter [Pltf. Ex. 2] concurrently with the execution and delivery of the contract, whereby Sheridan approved the director and the actor to portray the leading male role. Although this letter was addressed to RKO and signed by Sheridan, it was prepared by RKO. [R. 41, 42-43, 89-91.]

Said letter, which is also dated April 29, 1949, reads:

“Gentlemen:

“Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled ‘Carriage Entrance,’ which agreement is being entered into concurrently herewith.

“This will confirm that I have approved and hereby approve any of the following individuals to act as the director of ‘Carriage Entrance’:

“John Cromwell,

“Robert Stevenson,

“H. C. Potter.

“You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in ‘Carriage Entrance.’ You shall not be obligated to assign him to portray the leading male

role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“Dated April 29, 1949.

“Yours very truly,

“Ann Sheridan.” [R. 89-91.]

Therefore, as of April 29, 1949, the date the contract between the parties was executed, Sheridan was obligated to render her services pursuant to said contract. In fact, RKO refused to sign the contract until Sheridan had exercised all of the approvals granted her in the contract.

In the Pre-Trial Stipulation, the parties stipulated that when the contract between the parties was executed and delivered, Sheridan had approved (a) the script for the screenplay, (b) the director and (c) Robert Young as the actor to portray the leading male role. [R. 42-43.] Moreover, it should be noted that although the approval of the director was in the same form as the approval of the leading actor, RKO does not contend that Sheridan did not become obligated to render her services by reason of the fact that RKO was not required to assign the named individuals as director or that the approval of director was not binding upon Sheridan by reason of that fact.

The fact that RKO prepared the documents in such a manner so as not to obligate itself to assign one of the directors and the actor proposed by it and approved by Sheridan does not alter the fact that concurrently with the execution of the contract, Sheridan approved the 3 matters over which she had the right of approval and

thereby became obligated and bound to render her services pursuant to the contract.

Based on these stipulated facts, the District Court properly held that Sheridan did obligate herself and became bound on April 29, 1949, to render her services in "Carriage Entrance" and submitted to the jury the question of fact as to whether Sheridan did render any services to RKO pursuant to the contract.

The parties have also stipulated that the term of Sheridan's employment under the contract commenced July 6, 1949. [R. 43.] Robert Young did not refuse the role until July 11, 1949. [R. 43-44.] Sheridan was therefore bound to and did render services after the active commencement date of the term during which RKO had the right to require such services. From July 6, 1949 to August 16, 1949, Sheridan rendered services in connection with the production of "Carriage Entrance," required by the contract to be rendered by her and which services RKO requested her to render.

1. Sheridan conferred with the costume designer to discuss the costumes to be worn by Sheridan in "Carriage Entrance" and to examine the sketches of such costumes. [R. 121, 378.]

2. Sheridan reported to RKO for fittings of 13 costumes made for Sheridan's use in "Carriage Entrance." [R. 121-122, 378.]

3. Sheridan reported to RKO for discussions with RKO employees with reference to Sheridan's make-up and hair dress in the motion picture. [R. 116-117, 122, 377-378.]

4. Sheridan reported to RKO for conferences with RKO executives and employees concerning revisions of the screenplay. [R. 91-93.]

After April 29, 1949, RKO caused the script for "Carriage Entrance" to be revised. [R. 43.] When the revised script was submitted to Robert Young, he rejected the leading male role. [R. 43-44.] Thereafter, at the request of RKO, Sheridan came to the studio for conferences with executives of RKO on numerous occasions between July 11, 1949, up to and including August 16, 1949, for the purpose of discussing with RKO proposed substitutes for Robert Young as the actor to portray the leading male role in the motion picture. [R. 94, 96-98, 99-100, 101-102, 114-116, 117-122, 123-125, 126-128, 128-131, 257-265.]

On August 15, 1949, Sheridan sought and secured an interview with Howard R. Hughes, Managing Director-Production of RKO, at which time Sheridan requested the selection and designation by RKO of an actor. At that time Sheridan informed Mr. Hughes of her prior request for Robert Mitchum as the actor to portray the leading male role, a request which had been refused by RKO. Mr. Hughes again refused to assign Robert Mitchum to portray the leading male role in "Carriage Entrance." Mr. Hughes requested that Sheridan continue her cooperative conduct and again examine motion pictures of Robert Ryan, Mel Ferrer and Robert Preston, which actors had been suggested by RKO as possible substitutes for Robert Young. [R. 125-128, 418-419, 445-448.]

On August 16, 1949, Sheridan viewed motion pictures showing the three last named actors and reported to the

executives of RKO that in her opinion none of these actors would be properly cast in that role. [R. 128-129.] There were further discussions on August 16, 1949, of actors to replace Robert Young but no decision was reached. [R. 128-131.]

RKO then abruptly ended the discussions by sending to Sheridan a written notice, dated August 17, 1949, in which RKO stated that it would not utilize Sheridan's service in "Carriage Entrance" and would not pay any compensation to her. This written notice is Plaintiff's Exhibit 6. [R. 44, 132-134.]

Shortly thereafter RKO did produce "Carriage Entrance" and assigned Robert Mitchum to portray the leading male role and substituted Ava Gardner in place of Sheridan. [R. 44-45.]

#### **B. Analysis of RKO's Specifications of Error.**

RKO assigns as error the giving of Court's Instructions A, B; G, H-1, J-1, L, P and Q. [R. 587-588, 588-589, 591, 592, 592-593, 593-594, 595, 595-596.] RKO's objection to each of the above instructions is based on the contention that Sheridan was not obligated to render her services pursuant to the contract.

(1) RKO excepted to that portion of the Court's Instruction A which reads:

"\* \* \* This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; \* \* \*"  
[R. 588.]

RKO objects to this instruction on the ground that Robert Young was never approved as the actor to portray the leading male role and that Sheridan never became obligated to nor rendered services pursuant to the contract. [R. 570-571; RKO's Op. Br. p. 6.]

(2) RKO's exception to Court's Instruction B was on the ground that the District Court incorrectly held that Sheridan was obligated to render her services under the contract. [R. 571; RKO's Op. Br. p. 7.]

(3) Similarly, RKO's exception to Court's Instruction G was on the ground that entirely apart from paragraph 29 of the contract, Sheridan never became obligated to render her services under the contract. [R. 572; RKO's Op. Br. p. 8.]

(4) RKO did not object to that portion of Court's Instruction H-1 which limited Sheridan's recovery to \$50,000 plus interest. The exception to this instruction is based on the contention that the instruction assumes that Sheridan became obligated to render services on April 29, 1949, when she approved Robert Young as the actor to portray the leading male role, which RKO contends is not the case. [R. 572-573; RKO's Op. Br. pp. 8-9.]

(5) RKO's exception to Court's Instruction J-1 is based on its exception to Court's Instructions A and H-1, discussed above. [R. 573; RKO's Op. Br. p. 10.]

(6, 7 and 8) The objections to Court's Instructions L, P and Q relate back to Court's Instructions A and H-1 and RKO's contention that the District Court should not have instructed the jury that Sheridan was obligated to render her services pursuant to the contract. [R. 573; RKO's Op. Br. pp. 11-12.]

As noted in the Preliminary Statement herein, all of RKO's exceptions to the instructions given to the jury are based on the contention that the District Court erred in holding that Sheridan was obligated and bound to render her services pursuant to the contract.

(9, 10, 11, 12, 13 and 14) RKO's specifications of error relating to the Court's refusal to give RKO's Requested Instructions 1, 2, 5, 6, 7 and 8 do not raise any additional questions. [R. 573-575; RKO's Op. Br. pp. 12-17.] The jury instructions given by the District Court cover all of the points upon which RKO desired to have the jury instructed except that the District Court refused to adopt RKO's theory of the case insofar as it maintained that Sheridan was not obligated to render her services pursuant to the contract. [R. 57-68, 587-598.]

### C. Statement of Questions Presented by RKO's Appeal.

Although there are 14 specifications of error claimed by RKO, only one question is presented, to wit, did the District Court err in holding that when Sheridan approved (1) the script, (2) the director and (3) Robert Young as the actor to portray the leading male role in "Carriage Entrance," she became obligated and bound to render her services pursuant to the contract?

Point II of RKO's Opening Brief relates to the obligation of both parties to act in good faith. (RKO's Op. Br. pp. 26-27.) However, no contention is made that the District Court did not properly and adequately instruct the jury on the implied covenant of good faith. [See R. 593, 595-598.]

## ARGUMENT.

### I.

On April 29, 1949, Sheridan Obligated Herself to Render Services Pursuant to the Contract Commencing July 6, 1949.

RKO bases Point I of its opening brief argument on the proposition that when a contractual right is subject to a condition precedent, that right does not accrue when the event upon which performance is conditioned does not occur through no fault of the promisor; citing *Van Orden v. Metson*, 75 Cal. App. 2d 595, 171 P. 2d 485; *Cantwell v. Gage*, 111 Cal. App. 209, 295 Pac. 375; *Lynch v. Keystone Consol. Mng. Co.*, 163 Cal. 690, 126 Pac. 968. (RKO's Op. Br. pp. 19-25 at p. 25.)

We agree that this is the law but submit that this legal proposition, and the cases cited by RKO in support thereof, have no application to the case at bar.

RKO contends that the condition precedent to Sheridan's right to receive compensation is established by paragraph 1 of the contract granting Sheridan certain approvals and paragraph 29 of the contract which provides, in part, as follows:

“\* \* \* However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.”

On pages 19 to 25 of its opening brief, RKO sets forth its version of the evidence. While we do not agree with the conclusions drawn from the evidence as set forth

therein, we think that it is unnecessary to detail our disagreement since RKO does not deny that concurrently with the execution and delivery of the contract Sheridan approved the three items specified in paragraph 1; in fact, RKO has stipulated that such is the fact. [R. 42-43.]

It is true that the contract provided that before Sheridan became obligated to render services, there was an event which had to occur, namely, Sheridan's approval of (1) the script, (2) the director and (3) the actor to portray the leading male role in "Carriage Entrance." But it is also true that RKO was not willing to obligate itself to the contract without first taking action to remove the condition precedent by having Sheridan, concurrently with the execution of the contract, exercise the 3 approvals granted to her by paragraph 1 of the contract.

In view of the stipulated fact that Sheridan had exercised the 3 approvals, the District Court was required to hold and instruct the jury that on April 29, 1949, Sheridan obligated herself to render services. To adopt RKO's theory of the case, the District Court would have been required to hold that an "approval" is not an "approval."

The fact that on July 11, 1949, through no fault of Sheridan's but because Robert Young did not approve the script as revised by RKO, Young refused the leading male role does not alter the fact that on April 29, 1949, Sheridan was obligated to render services and rendered services pursuant to the contract from the time her term of employment started on July 6, 1949, until August 16, 1949, when RKO abruptly terminated the contract.

The right not to pay compensation given to RKO by the second sentence of paragraph 29 of the contract was dependent on two contingencies:

(1) If Sheridan did not approve any one or more of the items specified in paragraph 1, and did not become obligated to render any services pursuant to the contract; and

(2) If Sheridan did not render any services pursuant to the contract.

It was impossible for the first contingency to occur because admittedly the three items specified in paragraph 1 of the contract were approved by Sheridan concurrently with the execution of the contract.

The District Court properly submitted to the jury the question of fact raised by the second contingency, namely, whether Sheridan had rendered services pursuant to the contract.

The two contingencies excusing RKO from payment of compensation had to be present before RKO could rely on the second sentence of paragraph 29 of the contract. Aside from the fact that the parties stipulated that the first contingency was eliminated by Sheridan's approvals made concurrently with the execution of the contract, the jury, by rendering its verdict for Sheridan, held that Sheridan did render services pursuant to the contract. The happening of either contingency made the second sentence of paragraph 29 inoperative.

II.

**The Jury Was Properly Instructed as to the Implied  
Covenant of Good Faith.**

Point II of RKO's Opening Brief is devoted to a discussion of the covenant of good faith implied in every contract and cites *Universal Sales Corp. v. Calif. Press Mfg. Co.*, 20 Cal. 2d 751, 128 P. 2d 665, and *Nelson v. Isaac Abrahams*, 29 Cal. 2d 745, 177 P. 2d 931. (RKO's Op. Br. pp. 26-27.)

Both parties and the District Court agreed that Sheridan and RKO had to act in good faith and the District Court so instructed the jury. In Court's Instructions K and T the jury was fully instructed as to the implied covenant of good faith and the definition of "good faith." [R. 593, 597-598.] Court's Instruction K is taken verbatim from RKO's Requested Instruction No. 3 except for certain very minor language changes. [R. 59-60.] RKO did not object to Court's Instruction T which ably defines "good faith."

RKO also makes the point that the selection of an actor was the right and duty of RKO, that Sheridan could only approve or disapprove and that Sheridan had no right to select or propose an actor but only the right to pass judgment on those selected or proposed by RKO. (RKO's Op. Br. p. 27.) On this score RKO has no complaint since the District Court so instructed the jury. [Court's Inst. L; R. 594.]

The evidence shows that in the effort to arrive at a substitute for Robert Young, Sheridan suggested Robert

Mitchum, an actor under contract to RKO, but was informed that he was not available. Shortly after RKO discharged Sheridan, Mitchum was assigned to the leading male role. While it is true that RKO had the right to select the actor subject to Sheridan's approval, the single fact that RKO assigned the role to Mitchum after discharging Sheridan is ample evidence to support the finding that RKO did not act in good faith.

RKO also states:

“\* \* \* The controversy arose entirely from the insistence of plaintiff that she should have the final say as to any actor defendant proposed for the role—a right which plaintiff demanded despite the fact that it would seem reasonably certain that since defendant was investing more than a million dollars in the picture, it would select no actor who was not clearly competent and qualified. \* \* \*” (RKO's Op. Br. p. 26.)

We disagree with this statement which finds absolutely no support in the record. The implication contained therein is that Sheridan acted unreasonably in the matter of selecting a substitute actor. Sheridan approved Robert Young. Sheridan informed the executives of RKO that many of the actors mentioned in the discussions of a replacement for Robert Young were acceptable to her. Aside from the Mitchum situation, one of RKO's executives suggested Franchot Tone whom Sheridan approved but Tone was never assigned to the role. [R. 43, 90-91, 99-102, 115-116, 124-125, 127-128, 129-130, 131, 149-150.]

III.

The District Court Properly Submitted to the Jury the Issue of Whether Sheridan Rendered Services Pursuant to the Contract; the District Court Did Submit to the Jury the Issue of Whether the Parties Exercised Good Faith in Attempting to Reach an Agreement on a Substitute for Robert Young.

In Point III, RKO argues that the District Court should not have submitted to the jury the issue of whether Sheridan rendered services pursuant to the contract, but should only have submitted the issue of whether RKO acted in good faith in proposing a substitute for Robert Young and whether Sheridan exercised good faith in the matter. (RKO's Op. Br. pp. 28-29.)

RKO terminated the contract on August 17, 1949, without payment of any compensation whatsoever to Sheridan or a tender of payment. RKO claimed the right to do so by reason of the second sentence of paragraph 29. Sheridan contended that this provision of the contract was not operative if Sheridan made the approvals granted her by paragraph 1 of the contract *or* if Sheridan rendered services pursuant to the contract. The District Court did not accept this interpretation of the contract but held that the provision was not operative if Sheridan made the approvals *and* rendered services pursuant to the contract.

The parties stipulated that when the contract was executed and delivered Sheridan made the necessary approvals. [R. 42-43.] Under Sheridan's theory of the case this is sufficient to hold that the second sentence of paragraph 29 never became operative. However, since the District Court held that RKO was not required to pay compensation unless Sheridan made the approvals *and* rendered

services, the issue of whether Sheridan rendered services was submitted to the jury.<sup>2</sup>

RKO contends that most of the evidence tendered by the parties related to the issue of good faith and therefore this is the issue which should have been submitted to the jury. (RKO's Op. Br. p. 29.) While it may be true that most of the evidence related to the issue of good faith, this does not mean that said issue was the only issue in the case.

Sheridan introduced evidence as to the services rendered by her pursuant to the contract. Due to the use of the federal pre-trial procedure, it was unnecessary to introduce evidence of facts as to which the parties were able to stipulate—such as the stipulation that when the contract was executed and delivered Sheridan had approved (a) the script, (b) the director and (c) Robert Young as the actor who would portray the leading male role in "Carriage Entrance."

The District Court properly instructed the jury that after it had disposed of the issue of whether RKO had the right pursuant to paragraph 29 not to pay Sheridan any compensation whatsoever, it should address itself to the good faith issue.

---

<sup>2</sup>It should also be noted that under Sheridan's theory of the case, the fact that Sheridan rendered services pursuant to the contract is sufficient to hold that the second sentence of paragraph 29 is inoperative. Therefore, even if RKO is correct in its position that the approval of the leading actor was never made, the jury's finding that Sheridan rendered services pursuant to the contract is sufficient to support its verdict.

IV.

**The Charge of the District Court Was Not Erroneous  
in the Particulars Which RKO Assigns as Error.**

**Court's Instruction A.**

[R. 587; RKO's Op. Br. pp. 4-6, 30-31.]

RKO objects to Court's Instruction A on the ground that it instructs the jury that Sheridan became bound to render services pursuant to the contract when she approved Robert Young.

The contract obligated Sheridan to render her services except that paragraph 1 provided that she was not required to do so unless and until she approved the 3 items specified therein. When Sheridan approved the 3 items on April 29, 1949, she had done all that was necessary to obligate herself to render the services required of her under the contract.

RKO contends that Sheridan's approval of Robert Young was "conditional." The approval of Young was not conditional insofar as Sheridan was concerned. By exercising the approvals she became obligated to render her services and did render services after the term of the contract commenced on July 6, 1949, and before and after Robert Young's refusal to perform the role.

It is interesting to note that the language used by RKO in Plaintiff's Exhibit 2 as to the approval of a director is the same as the language used as to the approval of Robert Young. RKO does not contend that because of such language Sheridan was not bound by her approval of a director; and RKO has stipulated that by said letter Sheridan approved the director.

**Court's Instruction B.**

[R. 588; RKO's Op. Br. pp. 6-7, 31-33.]

RKO objects to that portion of Court's Instruction B which states that on April 29, 1949, Sheridan obligated herself to render services. The objection to this instruction is the same as RKO's objection to Court's Instruction A. Our answer is the same—on April 29, 1949, when Sheridan executed the contract and exercised the 3 approvals, she did become obligated to render her services.

**Court's Instruction G.**

[R. 591; RKO's Op. Br. pp. 7-8, 33-34.]

RKO relies on the second sentence of paragraph 29 as the provision of the contract which entitled it to terminate without payment of compensation to Sheridan. In light of that fact, it is patent that RKO has no standing to object to Court's Instruction G which instructs the jury that "issues arising under paragraph 29 of the contract" is one of the three parts of the case which the jury must consider.

This instruction was in favor of RKO and against Sheridan since it is Sheridan's contention that, based on the stipulated facts, the District Court should have instructed the jury that RKO could not rely on paragraph 29.

In so far as RKO objects to the instruction on the ground that the District Court should have held and instructed the jury that Sheridan never became obligated to render her services, the objection is the same as RKO's objection to Court's Instructions A and B.

Court's Instruction H-1.

[R. 592; RKO's Op. Br. pp. 8-9, 34-40.]

RKO contends that Court's Instruction H-1 was a formula instruction and sets forth certain rules of law relating to formula instructions.

Court's Instruction H-1 informed the jury as to the sole issue of fact arising under paragraph 29 of the contract and instructed the jury that their verdict must be for Sheridan if they decided this issue in her favor. This instruction was not a "formula" instruction within the concept of "formula" instructions discussed in the cases cited by RKO.

A brief review of the cases cited by RKO discloses that the objections to the instructions given in those cases are not objections applicable to the instructions given herein.

In *Mazzotta v. L. A. Ry. Corp.* (1944), 25 Cal. 2d 165, 153 P. 2d 338, the trial court instructed the jury in a personal injury action that if it found defendant could have avoided accident by using ordinary care, then it should find for plaintiff. The appellate court held the instruction was erroneous because the trial court should have required the jury to find not only that defendant was negligent, but that plaintiff was damaged as a proximate consequence of defendant's conduct.

In *La Rue v. Powell* (1935), 5 Cal. App. 2d 439, 42 P. 2d 1063, a similar instruction was held erroneous because of the omission of the elements of proximate cause and contributory negligence.

In *Keller v. Pac. Tel. & Tel. Co.* (1934), 2 Cal. App. 2d 513, 38 P. 2d 182, the trial court erroneously instructed the jury to find for plaintiff if defendant permitted his car

to go on the curb, without reference to whether or not the defendant negligently permitted his car to do so.

*Sinan v. A. T. & S. F. Ry. Co.* (1930), 103 Cal. App. 703, 284 Pac. 1041, was also a personal injury action and arose out of a train wreck caused by a defective switch. The trial court instructed the jury that if the defective switch was caused by third parties not employed by defendant, a verdict in favor of defendant should be returned. The instruction was held to be erroneous because it omitted the question of possible liability on the ground that defendant was negligent in not using diligence to discover the defective switch in time to avert the accident.

In *Starr v. L. A. Ry. Co.* (1921), 187 Cal. 270, 201 Pac. 599, the trial court instructed the jury to find for plaintiff in a personal injury action if it found a certain set of facts to be true. The instruction was erroneous because the instruction omitted elements requisite to a finding of proximate cause.

The issue presented in *Pierce v. United Gas & Electric Co.* (1911), 161 Cal. 176, 118 Pac. 700, was whether defendant was liable for the death of two children electrocuted while playing with a guy wire from defendant's transmission lines which had come loose. The guy wire did not contain electric current but the children were electrocuted when they brought the guy wire into contact with one of the power lines. The trial court instructed the jury to render a verdict for plaintiffs if it found: (1) that electricity is highly dangerous and a subtle instrument of death; (2) that defendant conducted high currents along public streets; (3) that defendant "maintained" a guy wire without insulation lying in the street in such a manner that children might draw it against electric

wires; and (4) that the children were not guilty of contributory negligence.

The Supreme Court of California held that this instruction was erroneous because the word "maintained" eliminated the question of whether the defendant should have discovered the loose guy wire as an element of determining negligence. The instruction was also held to be erroneous because it omitted submitting to the jury the question of whether the loose wire was likely to attract children to play with it and whether in such play it could be reasonably anticipated that the guy wire would be brought into contact with an electric wire.

These cases cited by RKO are all personal injury cases in which the instruction held erroneous was one in which the jury was instructed that if they found certain facts to be true, they must render a verdict for a designated party.<sup>3</sup>

In each instance more than one question of fact had to be resolved in order to determine liability and error was committed by the failure to submit to the jury one or more of such questions.

Court's Instruction H-1 was not a "formula" instruction. This instruction did not seek to set out the exact facts the jury had to find before it could render a verdict that Sheridan had rendered services pursuant to the contract. The District Court simply told the jury what issue had to be decided in order to determine whether RKO

---

<sup>3</sup>RKO also cited *Taha v. Finegold* (1947), 81 Cal. App. 2d 536, 184 P. 2d 533. In this case the appellate court held that the formula instruction complained of was not prejudicial by itself but reversed a verdict for defendant in a personal injury action due to repetitious instructions in favor of defendant.

could rely on the second sentence of paragraph 29 of the contract. The instruction did not omit any elements essential to determine RKO's right not to pay Sheridan any compensation whatever under the contract.

RKO also cites 24 Cal. Jur. 841, sec. 101; *Ryan v. L. A. I. & C. S. Co.* (1896), 112 Cal. 244, 44 Pac. 471; *Vinther v. Sunset Mutual, etc. Co.* (1916), 11 Cal. App. 2d 118, 53 P. 2d 182; *Clark v. Volpa Bros.* (1942), 51 Cal. App. 2d 173, 124 P. 2d 377, as authority for the proposition that an instruction is erroneous if it assumes the existence of a fact not in evidence.

These authorities are not applicable. The instruction stated that on April 29, 1949, Sheridan approved Robert Young as the actor for the leading male role. The parties stipulated that Sheridan did so. The District Court then properly held that by reason of Sheridan's exercise of the approvals she became bound to render her services to RKO.

RKO contends that Sheridan's activities in connection with "Carriage Entrance" did not constitute performance of services pursuant to the contract. This contention finds no support in the record. There is ample evidence to sustain the verdict that Sheridan did render services pursuant to the contract.

RKO also contends that the District Court nowhere told the jury "whether services of the nature indicated were services 'rendered pursuant to the contract.'"

This contention completely ignores the fact that the jury had before it the contract and in the preceding instruction. [Court's Instruction I-1] the District Court told the jury that in determining whether or not Sheridan rendered services pursuant to the contract, they could

wires; and (4) that the children were not guilty of contributory negligence.

The Supreme Court of California held that this instruction was erroneous because the word "maintained" eliminated the question of whether the defendant should have discovered the loose guy wire as an element of determining negligence. The instruction was also held to be erroneous because it omitted submitting to the jury the question of whether the loose wire was likely to attract children to play with it and whether in such play it could be reasonably anticipated that the guy wire would be brought into contact with an electric wire.

These cases cited by RKO are all personal injury cases in which the instruction held erroneous was one in which the jury was instructed that if they found certain facts to be true, they must render a verdict for a designated party.<sup>3</sup>

In each instance more than one question of fact had to be resolved in order to determine liability and error was committed by the failure to submit to the jury one or more of such questions.

Court's Instruction H-1 was not a "formula" instruction. This instruction did not seek to set out the exact facts the jury had to find before it could render a verdict that Sheridan had rendered services pursuant to the contract. The District Court simply told the jury what issue had to be decided in order to determine whether RKO

---

<sup>3</sup>RKO also cited *Taha v. Finegold* (1947), 81 Cal. App. 2d 536, 184 P. 2d 533. In this case the appellate court held that the formula instruction complained of was not prejudicial by itself but reversed a verdict for defendant in a personal injury action due to repetitious instructions in favor of defendant.

could rely on the second sentence of paragraph 29 of the contract. The instruction did not omit any elements essential to determine RKO's right not to pay Sheridan any compensation whatever under the contract.

RKO also cites 24 Cal. Jur. 841, sec. 101; *Ryan v. L. A. I. & C. S. Co.* (1896), 112 Cal. 244, 44 Pac. 471; *Vinther v. Sunset Mutual, etc. Co.* (1916), 11 Cal. App. 2d 118, 53 P. 2d 182; *Clark v. Volpa Bros.* (1942), 51 Cal. App. 2d 173, 124 P. 2d 377, as authority for the proposition that an instruction is erroneous if it assumes the existence of a fact not in evidence.

These authorities are not applicable. The instruction stated that on April 29, 1949, Sheridan approved Robert Young as the actor for the leading male role. The parties stipulated that Sheridan did so. The District Court then properly held that by reason of Sheridan's exercise of the approvals she became bound to render her services to RKO.

RKO contends that Sheridan's activities in connection with "Carriage Entrance" did not constitute performance of services pursuant to the contract. This contention finds no support in the record. There is ample evidence to sustain the verdict that Sheridan did render services pursuant to the contract.

RKO also contends that the District Court nowhere told the jury "whether services of the nature indicated were services 'rendered pursuant to the contract.'"

This contention completely ignores the fact that the jury had before it the contract and in the preceding instruction. [Court's Instruction I-1] the District Court told the jury that in determining whether or not Sheridan rendered services pursuant to the contract, they could

consider the provisions of paragraphs 4 and 12 of the contract. [R. 591-592.]

RKO's position is inconsistent in that it first complains that Court's Instruction H-1 is a "formula" instruction and next complains that the instruction was erroneous because it did not spell out the exact facts the jury had to find before it determined that Sheridan rendered services pursuant to the contract.<sup>4</sup>

Although much of RKO's argument is devoted to a discussion of formula instructions, the basic objection to Court's Instruction H-1 is based on RKO's contention that the District Court should not have instructed the jury that on April 29, 1949, Sheridan became bound to render her services to RKO. The fallacy of RKO's contention is demonstrated by contradicting RKO's unfounded remark that it is an "undisputed fact that plaintiff never approved an actor to portray the role . . ." (RKO's Op. Br. p. 39.) To the contrary, the parties stipulated that on April 29, 1949, Sheridan approved Robert Young to portray the leading male role and exercised the other approvals granted her in paragraph 1 of the contract.

---

<sup>4</sup>If the District Court had given a "formula" instruction which set out the detailed facts which had to be found in order to determine that Sheridan rendered services, the District Court would have had to run the risk of giving an erroneous instruction by omitting a set of facts which could be considered as services rendered pursuant to the contract.

Compare *Stein v. Lacassie* (1922), 189 Cal. 118, 207 Pac. 886, cited by RKO, in which the trial court committed error in instructing the jury as to "probable cause" in an action for malicious prosecution. The jury was told that unless it found defendant acted pursuant to advice of his own counsel or of the district attorney, after fully and fairly stating the facts to them, then the defendant was liable. The appellate court held that the instruction was erroneous because it was possible for the jury to find that defendant had abundant cause for procuring plaintiff's arrest regardless of the advice of counsel.

**Court's Instruction J-1.**

[R. 592; RKO's Op. Br. pp. 9-10, 41.]

RKO's objection to Court's Instruction J-1 was made upon all the grounds assigned by RKO for the objections to Court's Instructions A and H-1. Since we have replied to RKO's objections to Court's Instructions A and H-1, we need not further burden the Court by repeating our refutation of those objections.

**Court's Instructions L, P and Q.**

[R. 593, 595; RKO's Op. Br. pp. 10-12, 41-44.]

RKO's objections to Court's Instructions L, P and Q are based on the fact that the Court previously instructed the jury to render a verdict for Sheridan if they determined that she rendered services under the contract and the Court's refusal to instruct the jury "that if in good faith the defendant proposed an actor to portray the leading male role in the picture and plaintiff failed to approve said actor after reasonable opportunity so to do, *plaintiff never became obligated to render her services pursuant to the contract* and could not recover in the action." (RKO's Op. Br. p. 42; emphasis supplied.)

If Court's Instructions A, B, G, H-1 and J-1 are not erroneous, then Court's Instructions L, P and Q are not erroneous.<sup>5</sup> No purpose will be served by repeating our argument that the first mentioned instructions were not erroneous in the particulars assigned by RKO.

---

<sup>5</sup>The last paragraph of Court's Instruction L is RKO's Requested Instruction No. 4. [R. 60-61, 593.]

RKO's Requested Instructions Nos. 1, 2, 5, 6, 7 and 8.  
[R. 57-59, 61-63; RKO's Op. Br. pp. 12-17, 44-46.]

RKO's assignment of errors based on the District Court's refusal to give RKO's Requested Instructions Nos. 1, 2, 5, 6, 7 and 8 raises the same question raised by RKO's previous specifications of error. The essential contention is that Sheridan never approved an actor to portray the leading male role and that she did not become obligated on April 29, 1949, to render her services to RKO. Further discussion of these contentions in this brief is not warranted.

In determining whether the District Court erred in refusing to give the instructions requested by RKO, certain well established rules of law relating to jury instructions should be considered.

(1) “. . . It is the duty of a trial court to refuse requested instructions which incorrectly state the law applicable to the evidence and issues. The rule is the same where a requested charge is merely erroneous in part, for the court is not required to modify requested instructions or give others in lieu thereof if the jury is properly instructed as to the law of the case.” (24 Cal. Jur., Trial, pp. 803-804, Sec. 77.)

Also see:

*Nelson v. Southern Pacific* (1937), 8 Cal. 2d 648,  
67 P. 2d 682;

*Hart v. Farris* (1933), 218 Cal. 69, 21 P. 2d 432;

*Johnson v. Southern Pacific* (1930), 105 Cal. App.  
340, 288 Pac. 81.

(2) “. . . it is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, on its own motion or otherwise, correctly announces the substance of the law applicable to the case; this is true even though the requested charges state the principles involved more clearly and definitely than those given.” (24 Cal. Jur., Trial, pp. 806-810, Sec. 79.)

Also see:

*Estate of Nelson* (1923), 191 Cal. 280, 216 Pac. 368;

*Estate of Walker* (1919), 180 Cal. 478, 494, 181 Pac. 792;

*Kahn v. Triest-Rosenberg Cap. Co.* (1903), 139 Cal. 340, 348-349, 73 Pac. 164;

*Merguire v. O'Donnell* (1894), 103 Cal. 50, 36 Pac. 1033;

*Mullanix v. Basich* (1945), 67 Cal. App. 2d 675, 155 P. 2d 130, 133;

*Dawson v. Boyd* (1943), 61 Cal. App. 2d 471, 143 P. 2d 373, 379.

The first rule stated is applicable to each of said instructions requested by RKO as all of the instructions are based in whole or in part on RKO's incorrect contention that Sheridan was not bound to render her services to RKO when she exercised the three approvals granted her by the contract.

As to the second rule of law, a comparison of RKO's Requested Instructions to the instructions ultimately given by the District Court discloses that insofar as the requirement of good faith in selecting a substitute actor is involved in this case, the District Court adopted RKO's theory of the case. [R. 57-68, 581-604.]

### Conclusion.

RKO relied on the second sentence of paragraph 29 of the contract when it sent Sheridan the letter of termination [Pltf. Ex. 6] and sought to end its obligations under the contract without payment to Sheridan of any compensation.

It is Sheridan's contention that RKO did not have the right to rely on the second sentence of paragraph 29 if Sheridan exercised the approvals granted her by the contract *or* if Sheridan rendered any services to RKO pursuant to the contract.

The District Court held that this provision of the contract granting RKO the right to terminate without payment of compensation was inoperative if Sheridan exercised the approvals *and* rendered services. Based upon that construction of the contract (which was in favor of RKO and adverse to Sheridan), the District Court properly instructed the jury that on April 29, 1949, when Sheridan exercised the 3 approvals, she was obligated to render her services and submitted to the jury the issue of whether Sheridan did render services required of her by the contract.

RKO's specifications of error all necessarily rest upon the argument that an "approval" was not an "approval." Therefore, each of the specifications of error assigned by RKO should be overruled and that portion of the judgment which awards Sheridan \$50,000 plus interest should be affirmed.

Respectfully submitted,

GANG, KOPP & TYRE,

MARTIN GANG and

MILTON A. RUDIN,

By MARTIN GANG,

*Attorneys for Appellee, Ann Sheridan.*

